

IN THE MATTER OF THE ARBITRATION BETWEEN:

City of Litchfield, Minnesota

and

Minnesota Teamsters Public and Law Enforcement Employees Union, Local 320

**BMS Case No. 17PA0818
Bryant Blackwell, Grievant**

Opinion and Award of Arbitrator

Arbitrator:

Carol J. Tidwell

Appearances:

For the Employer:

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Date of the Award: September 5, 2017

Jurisdiction

This arbitration arises pursuant to a collective bargaining agreement (“CBA”)¹ between the City of Litchfield, Minnesota (“City” or “Employer”) and Minnesota Teamsters Public and Law Enforcement Employees Union, Local No. 320 (“Teamsters” or “Union”). The grievant Bryant Blackwell (“Grievant” or “Blackwell”), was employed by the City and is a member of the Union.

The undersigned neutral arbitrator was selected by the parties pursuant to the rules of the Minnesota Bureau of Mediation Services to conduct a hearing and render a binding arbitration award. The hearing was held in Litchfield, Minnesota on July 19, 2017. The parties stipulated that the matter was timely and properly before the arbitrator. Both parties were afforded a full and fair opportunity for the examination and cross-examination of witnesses who testified under oath as well as the introduction of exhibits. The attorneys representing the parties filed written briefs which were received by the arbitrator in a timely manner by August 14, 2017, at which time the record was closed.

Issue

The attorneys for the parties agreed on the issue at the hearing, as follows: “Was there just cause to terminate the Grievant and if not, what is the appropriate remedy?”

Factual Background

The City is a relatively small community located in Meeker County, Minnesota in the central part of the state, west of the Twin Cities of Minneapolis and St. Paul. The City provides law enforcement services to its residents through its police department (“Department”). The Department is headed by a chief of police, currently Patrick Fank (“Chief”), who has served in

¹ Employer Exhibit no. 1, effective January 1, 2016 through December 31, 2018.

that capacity since 2005 and who has been employed by the Department since 1999. The Chief has an associate degree in law enforcement and has served in the Minnesota Army National Guard. The Department currently has eight licensed officers in addition to the Chief; it shares an office location with the Meeker County Sheriff's Office, which has approximately 30 licensed officers.

The Grievant has an associate degree in criminal justice. He worked as a community service officer for two years in Meeker County before beginning work for the Department in January of 1993 as a licensed patrol officer. The Grievant was promoted to sergeant by the mayor in 2007, reporting directly to the Chief; he held the position of sergeant at the time of his termination by the City on January 24, 2017.

The basis for terminating the Grievant was his being stopped and arrested for DWI² on a public road while he was off duty at approximately 12:47 a.m. on October 27, 2016 by a Meeker County deputy sheriff³ including all behaviors related to this event as well as the effects of it. The arresting Deputy administered a preliminary breath test ("PBT") to the Grievant which registered his blood alcohol content ("BAC") at .146⁴; a standard breath test was refused by Sgt. Blackwell who requested that a blood test be conducted, according to the Deputy. Blood was drawn from the Grievant at a hospital in Meeker County within approximately two hours and measured his BAC at .186⁵, which is well over twice the legal limit in Minnesota of .08. The related events or effects of the arrest which precipitated the Grievant's termination include his dishonesty when stopped in response to a series of questions by the Deputy, the relatively small size of the Litchfield community and its expectations of the Department and its officers, the small size of the Department including the inability of diverting officers to non-public positions,

² Minnesota criminal statutes use the phrase "driving while impaired" ("DWI") to designate a person who is operating a motor vehicle after having consumed alcohol and/or a controlled substance to a level above the legal limit.

³ This officer will be referred to throughout as "Deputy."

⁴ Employer Exhibit #12; Meeker County Sheriff's Office Arrest/Citation Report.

⁵ Employer Exhibit #13; Meeker County Sheriff's Office supplemental report 01.

and the fact that a valid driver's license is required for the Grievant to perform his duties for the Department.⁶ The Chief testified that he reviewed a variety of documents in the course of his investigation including those related to the stop and arrest on October 27 as well as those concerning other, prior incidents involving the Grievant. The Chief conducted an investigation which the arbitrator finds was comprehensive and timely prior to terminating the Grievant, as he documented in a written report⁷ in which he elaborated on Officer Blackwell's violation of a number of Department rules and policies, all of which are cited below.

Relevant Contract and Policy Provisions

The relevant provision of the CBA of the parties which expires on December 31, 2018 is as follows:

Article 10. DISCIPLINE AND DISCHARGE

10.1. DISCIPLINE:

- A. Just Cause. Discipline action shall be imposed upon an employee only for just cause.

...

- C. Discipline shall be in the form of:
 - 1. Oral reprimand
 - 2. Written reprimand
 - 3. Suspension or demotion
 - 4. Discharge

The relevant policy and procedures provisions of the City are as follows:

⁶ The Grievant had his Minnesota driver's license revoked by the Minnesota Commissioner of Public Safety pursuant to state law on December 2, 2016. Blackwell sought judicial review of this revocation and was unsuccessful; revocation of his driving privileges were confirmed by the reviewing court on April 12, 2017. Pending reinstatement of his driving privileges after one year (presumably in December, 2017) the Grievant has had an ignition interlock device installed on his personal automobile; this allows him to drive lawfully pursuant to Department of Public Safety guidelines. Use of this device involves providing a breath sample prior to starting the car as well as at various times thereafter as requested without prior notice while driving.

⁷ Employer Exhibit #2.

Policy 320. Standards of Conduct⁸

320.1 This policy establishes standards of conduct that are consistent with the values and mission of the Litchfield Police Department and are expected of all department members. The standards contained in this policy are not intended to be an exhaustive list of requirements and prohibitions but they do identify many of the important matters concerning conduct. In addition to the provisions of this policy, members are subject to all other provisions contained in this manual, as well as any additional guidance on conduct that may be disseminated by this department or a member's supervisors.

...

320.5.1 LAWS, RULES AND ORDERS

(a) Violation of, or ordering or instructing a subordinate to violate any policy, procedure, rule, order, directive, requirement or failure to follow instructions contained in department or City manuals.

...

(c) Violation of federal, state, local or administrative laws, rules or regulations.

320.5.8 PERFORMANCE

...

(c) Failure to participate in, or giving false or misleading statements, or misrepresenting or omitting material information to a supervisor or other person in a position of authority, in connection with any investigation or in the reporting of any department-related business.

(d) Being untruthful or knowingly making false, misleading or malicious statements that are reasonably calculated to harm the reputation, authority or official standing of this department or its members.

...

(i) Any act on- or off-duty that brings discredit to this department.

320.5.9 CONDUCT

...

(h) Criminal, dishonest, or disgraceful conduct, whether on- or off-duty, that adversely affects the member's relationship with this department.

...

(m) Any other on- or off-duty conduct which any members knows or reasonably should know is unbecoming a member of this department, is contrary to good order, efficiency or morale, or tends to reflect unfavorably upon this department or its members.

⁸ Employer Exhibit #3.

320.5.10 SAFETY

...

(b) Failure to maintain current licenses or certifications required for the assignment or position (e.g. driver's license, first aid).

Policy 340. Professional Conduct of Peace Officers⁹

340.1 POLICY

It is the policy of the Litchfield Police Department to investigate circumstances that suggest an officer has engaged in unbecoming conduct, and impose disciplinary action when appropriate.

340.2 PROCEDURE

This policy applies to all officers of this agency engaged in official duties whether within or outside of the territorial jurisdiction of this agency. Unless otherwise noted this policy also applies to off duty conduct. Conduct not mentioned under a specific rule but that violates a general principle is prohibited.

(a) PRINCIPLE ONE – Peace officers shall conduct themselves, whether on or off duty, in accordance with the Constitution of the United States, the Minnesota Constitution, and all applicable laws, ordinances and rules enacted or established pursuant to legal authority.

...

2. Rules

...

(d) Peace officers, whether on or off duty, shall not knowingly commit any criminal offense under any laws of the United States or any state or local jurisdiction.

...

(b) PRINCIPLE TWO – Peace officers shall refrain from any conduct in an official capacity that detracts from the public's faith in the integrity of the criminal justice system.

...

(d) PRINCIPLE FOUR – Peace officers shall not, whether on or off duty, exhibit any conduct which discredits themselves or their agency or otherwise impairs their ability or that of other officers or the agency to provide law enforcements services to the community.

1. Rationale: A peace officer's ability to perform his or her duties is dependent upon the respect and confidence communities have for the officer and law enforcement

⁹ Employer Exhibit #4.

officers in general. Peace officers must conduct themselves in a manner consistent with the integrity and trustworthiness expected of them by the public.

Burden of Proof

The Employer bears the burden of proving to the satisfaction of the arbitrator by clear and convincing evidence¹⁰ that there was just cause to terminate the Grievant's employment.

Position of Employer

The City asserts that, for a variety of reasons based on Departmental policies and procedures and the rationale on which they are founded, cited above, the Grievant's behavior on October 27, 2016 is incompatible with continuing his employment as sergeant or a peace officer for the Employer. The City asks that the grievance be denied and the Grievant's termination be upheld.

Position of Union

The Union allows that the Grievant made a mistake on October 27, 2016 but asserts that he is contrite and amenable to corrective action. It asks that the Grievant be reinstated and made whole, and potentially subject to corrective action or any other remedy the arbitrator considers appropriate.

Discussion and Findings

Whether there is just cause to terminate the Grievant in this case initially requires the arbitrator to address a fundamental inquiry, namely, was the Grievant guilty of some

¹⁰ The arbitrator adopts the mid-level standard of proof here, namely, clear and convincing evidence (this is higher than "preponderance of the evidence" but lower than "beyond a reasonable doubt"), but agrees with other arbitrators that proof formulae are difficult to quantify in practice. The arbitrator agrees with arbitrator Spencer who wrote that the requirement of proof where a criminal act is alleged is that "the arbitrator must be completely convinced that the employee was guilty." Elkouri & Elkouri, *How Arbitration Works*, 8th Edition, 2016, Ch. 15.3.D.ii.a. citing Columbia Presbyterian Hosp., 79 LA 24, 27 (Spencer, 1982).

misconduct or the violation of a reasonable rule, policy, or procedure of which the employee had notice. If the arbitrator finds that this has occurred, the arbitrator must then determine whether the penalty imposed by the employer is commensurate with the misconduct or violation, including whether any mitigating factors are present. The analysis of whether there is just cause and what the remedy shall be essentially requires that the arbitrator place the behavior of the Grievant in appropriate context.

The arbitrator finds that the policies, principles, and procedures cited above which the Employer asserts were violated by the Grievant are all eminently reasonable, including the provisions that relate to off duty conduct. Police officers are charged with enforcing the law and their violation of the law, especially when this occurs in a public setting as is the case with a DWI violation on a public road, is especially harmful to the reputation and ability of the police to maintain law and order among the general population. This is just as true when the behavior occurs off duty. It is accurate, as the City's rules state, that an officer's ability to do his or her job is dependent upon the respect and confidence the local population has in the police. It is highly reasonable for the City to consider the potential effect that an officer's behavior at any time, on or off duty, has on the community's opinion of the officer and by extension the local police department, and to promulgate rules that require exemplary behavior of its officers at all times. Further, the arbitrator finds that these reasonable rules were all known by the Grievant; it is axiomatic that his many years of service with the Department as well as his position of leadership as a sergeant within the Department would mean that he was well aware of these rules.¹¹

Did the Grievant violate any of the cited rules of the City that apply to police officers? In the first instance, did the Grievant violate the law by driving a motor vehicle off duty while impaired by alcohol consumption on October 27, 2016? For the purpose of resolving the issue

¹¹ The Grievant did not assert that he was unaware of the rules cited by the Employer for his termination.

presented in this arbitration the arbitrator finds that he did violate, specifically, Rule 320 entitled Standards of Conduct, Section 320.5.9(h), among others, which proscribes: “Criminal, dishonest, or disgraceful conduct, whether on- or off-duty, that adversely affects the member’s relationship with this department,” cited above.¹²

The Deputy who stopped and arrested the Grievant on October 27, 2016 for a DWI violation has an associate degree in law enforcement. Prior to joining the Meeker County Sheriff’s Office less than a year before he stopped the Grievant he worked for the Foley, Minnesota police department. He testified at length at the hearing, narrating the showing of his squad car recording (video only) that showed the Grievant’s car prior to the stop as it made its way along the road. The Deputy also narrated the showing of his body cam recording (video and audio) which he turned on after stopping the Grievant and before approaching his car. The body cam showed the Deputy and the Grievant and their verbal exchange subsequent to the stop, the Deputy’s administration of field sobriety tests, and finally the Grievant’s arrest. Additionally, the arbitrator viewed these recordings post-hearing in the preparation of this opinion and award. The arbitrator observed the Grievant’s car weaving on the road prior to the stop, crossing both the center line and the fog line, could see his repeated difficulty while attempting to perform the field sobriety tests administered by the Deputy, and has noted the BAC readings from both the PBT and the blood test. She is completely convinced of the Grievant’s guilt by the evidence and testimony presented at the hearing and therefore finds that the Grievant was indeed driving his vehicle on a public road after having consumed a large quantity of alcohol in a state of impairment, all in violation of the law and the reasonable, known rules of his Employer.

¹² The arbitrator’s role is not to determine whether there should be a criminal conviction, but rather to determine whether the Grievant committed the act(s) for which he was terminated. The arbitrator notes that the Grievant challenged the stop by the Deputy and a court found that there was probable cause for it. The Grievant is also challenging his consent to the blood test, saying he did not request it. Further, the Grievant has plead not guilty to the DWI charge, and trial is reportedly scheduled for the fall of 2017.

Further, the arbitrator finds that the Grievant also violated, among others, the reasonable rule of the City that proscribes “giving false or misleading statements, or misrepresenting or omitting material information to a supervisor or other person in a position of authority, in connection with any investigation or in the reporting of any department-related business.”¹³

The Deputy testified that he recognized the Grievant as he approached the vehicle then stopped on the side of the road; the Grievant, as a sergeant in the Department which shares offices with the county sheriff, was well-known to him. The Grievant recognized the Deputy as well, calling him by name as the Deputy approached the Grievant’s car. The Deputy was clearly in a position of authority vis-à-vis the Grievant due to the legal stop. The verbal exchange between the two documents the Deputy’s questions of the Grievant after the stop in the course of his investigation, namely, was the Grievant drinking, how many drinks did he have, how recently did he have anything to drink, etc., all questions routinely asked by law enforcement in this situation. The Grievant was not forthcoming in his responses to the Deputy but rather answered “no” to the first question as to whether he had anything to drink that night. In his responses to the next time he was asked if he’d been drinking the Grievant admitted to having “two beers” and then later said that he’d had two or three beers one to two hours before the stop. His response of “two beers” was clearly false given the .146 BAC result of the PBT. As to his third response about the timing and amount of his consumption, the increased BAC result of .186 according to the blood test as compared to the earlier PBT reading of .146 belies the truthfulness of this response.¹⁴ While the Grievant’s consumption of alcohol likely impaired his judgment that night the fact remains that he lied to the Deputy, whom he knew, several times after he was stopped. The Grievant cannot credibly defend his untruthfulness because of his state of voluntary intoxication.

¹³ See Employer Exhibit #3, Section 320.5.8.(c).

¹⁴ If the Grievant had stopped drinking several hours earlier as he stated to the Deputy, his BAC would not have risen dramatically as it did from the time the PBT was done to the time the blood test was done.

The City presented evidence at the hearing concerning the effect of the Grievant's behavior on October 27, 2016 on the Litchfield community and its expectations of the Department, and properly so. As cited above¹⁵ in yet another reasonable rule of the City: "A peace officer's ability to perform his or her duties is dependent upon the respect and confidence communities have for the officer and law enforcement officers in general. Peace officers must conduct themselves in a manner consistent with the integrity and trustworthiness expected of them by the public." In other words, the Litchfield Police Department must have and maintain credibility with the local community or it cannot do its job effectively. This is a greater challenge in a place such as Litchfield, the Chief testified, because "infractions (by the police) are magnified in a small community."¹⁶ This is not to say that residents of cities the size of Minneapolis, for example, are not demanding of or deserving of good behavior by their law enforcement officers, but there is much greater notoriety and effect on the community when a police officer engages in bad behavior in a town of less than 7,000 as compared to an officer who works in a city of over 400,000. As another arbitrator wrote in a 1997 police misconduct case:

Any intentional violation of the law by a police officer is a serious matter particularly where it is publicly done, for then disrepute and undermining of the integrity of the department is involved. This is particularly true in such a small community . . . where such incidents become widely known and notorious in the public's mind.¹⁷

¹⁵ Employer Exhibit #4, Section 340.2.d.(1).

¹⁶ The Grievant's arrest and being charged with DWI in October, 2016 appeared in two local media accounts in early December, 2016. See Employer Exhibit #14. Both the Litchfield Independent Review and the Willmar West Central Tribune ran stories about the incident, with the Willmar account referring to a charge against the Grievant in 2000 when he was alleged to have left the scene of an accident after having been driving under the influence. The current story noted that the Grievant was not convicted and that the charges were later dropped in the 2000 incident.

¹⁷ Elkouri & Elkouri, *How Arbitration Works*, 8th Edition, 2016, Ch. 21.3.C. citing City of Rogers City, Mich., 110 LA 92, 95 (Daniel, 1997). Rogers City, Michigan had a population of 2,827 in 2010; Litchfield's current population is less than 7,000.

Further rationale for terminating the Grievant after his DWI arrest was the administrative loss of his driver's license. The Chief testified that it is necessary for an officer in the Department to drive a squad car in order to perform his duties and therefore that the Grievant must have a valid driver's license. There are simply not jobs within the Department, given its small size, where an officer can perform needed functions without having a valid driver's license. The Grievant's driver's license was conditionally reinstated, however, this was only upon the installation of an ignition lock device on his personal vehicle; he does not currently have permission from the Commissioner of Public Safety to drive a vehicle without this device.¹⁸ Installing such a device on a squad car so the Grievant could comply with the administrative requirement of an ignition lock would be expensive, difficult, and at the least an inconvenience for the officers who work on other shifts and would be required to use this car,¹⁹ according to the Chief. A safety concern also exists as any driver of a vehicle with this device would have to provide a breath sample while driving as the device requests, which may be en route to an emergency, for example. Installing an ignition lock device on a Department squad car would be expensive, potentially unsafe, and not operationally feasible for the Department in the arbitrator's opinion. These concerns are in addition to the undoubtedly negative reaction of the community to the City's expenditure of funds to install such a device.

Alternatively to placing an ignition lock on the Grievant's squad car, the Union has argued that, pursuant to the Minnesota law which requires an employer-owned vehicle that will be operated by a program participant (the Grievant, in this case) display special "whiskey license plates,"²⁰ the Department could display these plates on the Department car used by the Grievant, which could be an unmarked car. Displaying whisky license plates on a City-owned

¹⁸ Union Exhibit #8, the current Minnesota driver's license of the Grievant showing this restriction.

¹⁹ Presumably, the Department does not have individual squad cars for every officer, meaning that the cars are used by different officers who work on other shifts.

²⁰ "Whiskey plates" identify the driver of his or her employer's vehicle as someone who has had a DWI. This is not the official name of these license plates; they are colloquially referred to as "whiskey plates" because the letter and numbering system on them always begins with a "W."

car issued to a law enforcement officer, however, whether marked or not, is at best preposterous in the view of the arbitrator, even ignoring the expense issue of dedicating one car to the Grievant.²¹ A solution such as this may be acceptable in larger cities where police officers are not recognizable on sight by many local residents, however the arbitrator concludes that Litchfield is not such a community given its size.

Next, what are the additional or mitigating factors involved in the termination of the Grievant, in order to put the Grievant's behavior and rule violations into appropriate context? To begin with, what is the Grievant's prior disciplinary record and other behaviors during his time with the Litchfield Police Department?

In September of 2000²² there was an incident²³ in which the Grievant's vehicle was found by a Meeker County deputy, rolled over and unoccupied. The deputy who found it recognized it as belonging to then-officer Blackwell; the deputy asked the Minnesota state patrol to investigate as it looked as though an occupant of the vehicle had been injured and no accident had been reported. The person who was Department chief at that time had two officers go to the Grievant's home, where they found him consuming alcohol according to the testimony of the (current) Chief based on his post-October 2016 investigation and the admission of the Grievant upon cross examination at the hearing. Although he was charged with DWI these charges were later dismissed "after the District Court ruled against the MN Commissioner of Public Safety in regards to the test results."²⁴ The Grievant agreed with the City's description of the reason for

²¹ The arbitrator believes that the idea of a law enforcement vehicle (even if unmarked) displaying license plates that publicly proclaim that the officer driving it has been arrested for DWI constitutes the dictionary definition of preposterous in light of an officer's duties and the credibility needed with the community in order for the officer to perform those duties.

²² This incident occurred while the Grievant was a patrol officer.

²³ This is the incident referred to in the December, 2016 media account about the Grievant's DWI arrest that October.

²⁴ Employer Exhibit #15.A., a memo from the former chief Dicke to the Grievant dated December 17, 2001.

the charges being dropped as “post-consumption.”²⁵ The written reprimand for conduct unbecoming a police officer that was imposed at the time was as a result of his failure to report the accident he was in as well as the accompanying erosion of public respect and confidence in the Department caused by this failure. A further document related to this incident dated January 4, 2002²⁶ memorializes an agreement between former chief Dicke and the Grievant that the written reprimand would remain in the Grievant’s file until October 4, 2002 at which time, assuming there “have been no same or similar incidents it would be removed.” This document was not physically removed from the Grievant’s file as a practical matter, however, and was found by the current Chief. The arbitrator notes the agreement of 2002 and the age of the written discipline and gives this incident only minimal weight as a disciplinary matter, as the Union argued it should be given, at most; she does deem it to be part of a pattern of bad behavior by the Grievant when having consumed alcohol.

In July of 2014 the Grievant and his girlfriend were involved in a domestic dispute at his home as documented by officers of the Department.²⁷ Due to the potential conflict of interest of the Grievant’s Employer investigating him as one of its officers the City engaged an outside law firm to investigate and prepare a recommendation. It is instructive to cite the entirety of the response of the attorney who conducted the investigation in recommending that no charges be filed:

I have reviewed the statements and the police reports in the above matter. It is my conclusion that no charges should be filed in this matter. Given the significant amount of alcohol consumption that apparently took place, the fact that there are no physical injuries of any kind, and also the extremely conflicting statements by the parties and the retraction by the alleged victim,²⁸ I don’t believe that the situation merits any criminal charges.

²⁵ If a driver who has been in an accident involving the use of alcohol then consumes alcohol afterwards (generally called “post-consumption”) it is effectively impossible for a breath or blood test to produce an accurate reading of what the person’s alcohol level was at the time the accident occurred.

²⁶ Union Exhibit #1.

²⁷ Employer Exhibit #15.C.

²⁸ This was the Grievant’s girlfriend.

Just as an aside, given the ages²⁹ of the participants, I am a little surprised at the lack of maturity exhibited by both parties in this case.

If you need any further input, please contact me.

The arbitrator notes that this incident resulted in no disciplinary action against the Grievant, however, she sees this as another example of bad behavior by the Grievant involving his consumption of alcohol during his tenure on the Department.

The Grievant was promoted to sergeant by the mayor in 2007. By memo dated May 28, 2008 to the Grievant the Chief extended Sgt. Blackwell's probationary period in that position by six months. Among the concerns the Chief raised at that time was that the Grievant had not been seen for a ten (10) hour shift and was at home prior to the end of his scheduled shift.³⁰ The Chief noted that being absent for a shift and being home before the end of his shift was "... not leading (but was) slacking." The Chief further stated in this memo that "Your current staff of Officers prefers to avoid contact with you, due to your negative attitude ...". This same memo outlined the responsibilities of a police sergeant,³¹ the conduct required of a sergeant towards other officers, as well as other specific and general expectations of the Grievant. Incongruously in light of the May, 2008 memo which was directed to him, the Grievant testified at the hearing that his responsibilities as a sergeant were the same as those of a patrol officer. This extension of probation for the Grievant after becoming a sergeant is akin to corrective action of an officer at a lower level; his performance was reasonably deemed insufficient on account of the specified actions and he had a consequence imposed as a result, namely, the extension of his probation, with the threat of further consequence (demotion).

²⁹ The Grievant was age 46 at the time, according to the date of birth listed on his driver's license, see Union Exhibit #8.

³⁰ Employer Exhibit #15.B.

³¹ These included overseeing operations of the department, coordinating situations and events of police personnel, being responsible for scheduling work shifts, and being responsible for directing the work of other employees. Employer Exhibit#15.B.

In the written investigatory summary report prepared by the Chief³² he outlined the considerable reluctance that prosecutors would have about calling the Grievant to testify in criminal prosecutions, based on the Chief's discussion with the Meeker County Attorney. The Brady/Giglio line of cases³³ requires a prosecutor to disclose to the defense any information s/he has about the credibility of a government witness, including a police officer who has been arrested for DWI such as the Grievant. Not only is disclosure required but a prosecutor has an affirmative duty to seek out any information that casts doubt on the credibility of a testifying officer and must then disclose the same to the defense in a criminal case.³⁴ While it might be possible for a larger police department to continue the employment of an officer about whom Brady/Giglio reporting is required, the ability of the Department to do so given its size is essentially nonexistent. As with requiring all officers to have a valid driver's license, the Department needs all of its eight officers to be able to conduct arrests and fully provide credible testimony in court as needed and not have their trustworthiness questioned following a Brady/Giglio disclosure on account of their own bad behavior. Again, a police department the size of those in large cities may have property room or other such non-public positions for officers with Brady/Giglio requirements or who do not have a driver's license; the Litchfield Police Department is not such a department. While the Union is correct that the existence of required Brady/Giglio disclosure about an officer does not automatically require that officer's termination, it does not mean that a Brady/Giglio officer must be retained if the Department cannot accommodate that officer.

The Grievant's consumption of alcohol has been cited as a factor in almost every event of his bad behavior while employed by the City, including most especially the arrest in October,

³² Employer Exhibit #2.

³³ Brady and Giglio are U.S. Supreme Court decisions involving parties by these names.

³⁴ The Hutchinson, Minnesota city attorney, an experienced prosecutor, testified about the problems for a prosecutor that are encountered when the testimony of a law enforcement officer, about whom Brady/Giglio disclosure must be and has been made, is required as part of a prosecution. At the least, predictably, the defense calls the testimony of the officer into question.

2016 that precipitated his termination. A witness called by the Union³⁵ to testify for the Grievant stated on cross examination that Sgt. Blackwell was still drinking; the Grievant was in the hearing room for this testimony and did not refute or contradict it during his later testimony. At no time over the course of his employment did the Grievant ask the Chief or anyone at the City for help with or treatment for problems with alcohol consumption or any other condition. While Sgt. Blackwell did verbally apologize to the Chief the day after his arrest, there was no testimony that he has at any time admitted having a problem with alcohol consumption or any other condition, or that he has stated or indicated that he wants to seek treatment, professional or otherwise.

The arbitrator recognizes that the disciplinary record for the Grievant, who had served in the Department for about 23 year as of the date of his termination, is relatively sparse.³⁶ She notes that the Department has not done performance evaluations for the Grievant or apparently any other officers in the Department for about 20 years, and so there is no such record to review. The arbitrator acknowledges and agrees with the need for progressive discipline in most termination cases. Employees should not only be made aware of the rules to which they will be held but, further, should be provided with specific information about their failure to satisfy the rules. For a variety of reasons, despite the relatively sparse progressive discipline of the Grievant, she nevertheless concludes that his termination must be upheld.

Foremost in this regard, the Grievant's behavior on October 27, 2016 was egregious. He operated a motor vehicle on a public highway while significantly impaired by very recent alcohol consumption (his BAC was over twice the legal limit, rising from .146 at the time he took the PBT until the later blood test was done and showed .186). He did this as a sergeant who was

³⁵ This witness is an enforcement officer for the Department of Natural Resources ("DNR") in the Meeker County area, and is a friend of, and fellow motorcycle rider with, the Grievant.

³⁶ The CBA does not have a provision making prior discipline ineffective as a basis for future discipline based on the passage of time.

expected to be a leader in the Department for which he had worked for a lengthy period of time. He lied repeatedly to the arresting officer, whom he knew. He has not taken responsibility for his behavior that night by addressing the underlying problem(s) or even indicating a willingness to do so. The CBA of the parties references progressive discipline but does not require it as no collective bargaining agreement ever does, in the experience of the arbitrator. Arbitrators and labor law in general recognize that there are circumstances of behavior so far beyond the pale that immediate discharge is a just remedy.

The Grievant's position as a sergeant and therefore a leader in the Department and the community requires exemplary behavior of him, whether on or off duty. The standard to which he is held as a sergeant is higher than the already demanding standard to which patrol officers are properly held by the Department. The Grievant's various infractions over the years all involved bad behavior by him which he knew or should have known would violate the reasonable expectations of him as an officer and later as a sergeant, and would place his continued employment in the Department at risk, including most especially his arrest for DWI in October of 2016 and the related effects of this event on the Department and the community.

The Grievant's verbal apology to the Chief the day after his arrest when the Chief came to his home does not support a conclusion that he is contrite or that he has accepted responsibility for his bad behavior or especially the cause(s) of it. The Chief sent the Grievant a letter dated November 30, 2016³⁷ in the course of his investigation of the DWI arrest, notifying him of his right to a pre-disciplinary response; the Grievant failed to reply to the Chief. He has not addressed the Deputy who arrested him, nor has he apologized to him even in a general way, for example, by saying that he regretted putting the Deputy in the position he did (by driving while impaired and then by lying to him).³⁸ The Grievant has not apologized even in a general way to

³⁷ Employer Exhibit #9.

³⁸ The arbitrator recognizes that the Grievant's attorney may well have advised him not to apologize to the Deputy for his specific behavior that night due to his plea of not guilty to the DWI charge as well as challenging the consent for the blood test.

the members of the Department with whom he worked and for whom he was supposed to provide leadership; similarly he has not apologized to the members of the Meeker County Sheriff's Office with whom the Department shares quarters and with whom he would have to work on a regular basis if he was reinstated. By far the most important concern is that he has not asked for help with, nor initiated any treatment for, his over-consumption/abuse of alcohol which has been amply demonstrated to the arbitrator's satisfaction by the history of his behavior.³⁹

Additionally, no fellow officers from the Department or the Meeker County Sheriff's Office came forward to testify about their desire to see the Grievant reinstated. While such statements are not dispositive one way or the other in a case such as this, and while the City retains the burden of proving its case to the arbitrator, it is telling that no fellow officer came forward on the Grievant's behalf. The one witness who is an enforcement officer in the area for the state DNR attempted to do this but in his position he has not nor would he work directly nor routinely with the Grievant if reinstated. His position as a self-described friend, fellow motorcycle rider, and perhaps drinking companion⁴⁰ of the Grievant undercuts his testimony in the arbitrator's view.

The arbitrator specifically notes that she did not include as any part of the rationale for her findings or decision that the Grievant has pleaded not guilty to the criminal charge of DWI and is also contesting the validity of consent for the blood test that showed his BAC to be .186. The City argues that these actions further show the Grievant's refusal to take responsibility for his actions in addition to his other behaviors, and the arbitrator does not necessarily disagree. The arbitrator is convinced, however, that employees such as the Grievant in this case should

³⁹ The Grievant did testify at the hearing that watching the videos was difficult for him because "It's not me; I made a horrible decision. I wish I wasn't here. It's my fault." Even these statements made in the presence of and presumably for the benefit of the arbitrator who is charged with deciding this case do not indicate his acceptance of responsibility going forward as they do not indicate any desire to address the underlying cause(s) of his bad behavior. The Grievant is long past the point where simply verbalizing regret is sufficient to demonstrate that he takes responsibility for his behavior.

⁴⁰ This is the witness who testified that the Grievant still drinks.

not be effectively forced to forego their Constitutional right to a trial and to contest evidence against themselves in a criminal proceeding in order to maintain or regain their employment.

Remedy

The arbitrator considered a number of remedies in lieu of termination as have been applied by other arbitrators; she rejected these as appropriate discipline for the Grievant's behavior in this case as discussed below.

1. Reinstating him with a demotion to his former role as a patrol officer would remove his leadership responsibilities but would not diminish the standards of conduct to which he would still be held and which he egregiously violated on October 27, 2016.

2. Suspending him pending restoration of his driver's license when that occurs would address only one part of the rationale for his discharge, namely, not having a valid driver's license. The other significant concerns about his ability to properly conduct himself and perform his duties would remain.

3. Reinstating him under a "last chance agreement" whereby any future overuse of alcohol with resulting bad behavior on or off duty would result in his termination would only be kicking the can down the road to another arbitrator. The Grievant has not acknowledged having a problem with alcohol nor has he asked for or sought treatment for this. His future holds the likely specter of more bad behavior such as a DWI; having this occur again while he is an officer of the Department would be a disservice to the Department, his fellow officers, and especially to the community which they all serve.

4. Lastly, reinstating him only upon his successful treatment for alcohol abuse would be necessarily based on his recognition and acceptance of a need for this as well as a willingness to undertake such treatment. There is simply no evidence that he has accepted or even recognized the need for treatment.

It is well-settled in labor matters concerning discipline that the punishment must fit the crime. The arbitrator concludes that upholding the Grievant's termination meets this standard; indeed she concludes that it is the only appropriate remedy in this case.

Opinion and Award

Based on the above facts, discussion, documentation, and analysis of the sworn testimony and evidence provided at the hearing the arbitrator concludes that the Employer had just cause to terminate the Grievant as a result of the behavior on which his discharge was based and its effects, and that the City therefore has not violated the CBA.

The grievance is **DENIED**.

The arbitrator retains jurisdiction for a period of sixty (60) days from the date of this Award to address any issues as may be necessary.



Dated: September 5, 2017

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